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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES GRIGGS RAINES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court dismissing the complaint is not yet reported. Its text is set forth in the Appendix, *infra,* pp. 15–34.

JURISDICTION

On April 16, 1959, the District Court for the Middle District of Georgia dismissed the complaint on the ground that 42 U.S.C. 1971 (a), (c), the statute pursuant to which this action was brought, is unconstitutional as beyond the power conferred on Congress by Section 2 of the Fifteenth Amendment to the Constitution of the United States. A notice of appeal to this Court was filed in the District Court on April

23, 1959. The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S. C. 1252.

STATUTE INVOLVED

42 U.S.C. 1971, 16 Stat. 140, as amended, 71 Stat. 634, provides in pertinent part that:

> (a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.
>
> (b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.
>
> (c) Whenever any person has engaged or there are reasonable grounds to believe that any

person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

* * * * *

QUESTION PRESENTED

Subsection (a) of 42 U.S.C. 1971, derived from the Civil Rights Act of 1870, provides that "All citizens of the United States who are otherwise qualified by law to vote at any election * * * shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude * * *." Subsection (c) of 42 U.S.C. 1971, added by the Civil Rights Act of 1957, provides that "Whenever any person has engaged * * * in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute * * * in the name of the United States, a civil action or other proper proceeding for preventive relief * * *."

In the instant action brought by the Attorney General, on behalf of the United States, to restrain defendant state officials from engaging, while acting under color of law, in certain acts and practices alleged to be in violation of 42 U.S.C. 1971(a), the question is whether subsections (a) and (c) are uncon-

stitutional *in toto* because, as construed by the District Court but not by the Government or by any other court, they may permit the Attorney General to seek injunctive relief "against a private citizen for an individual act, divorced completely from state action" (Appendix, *infra*, p. 33).

STATEMENT

On September 4, 1958, the Attorney General, acting for and on behalf of the United States and pursuant to the authority conferred upon him by 42 U.S.C. 1971(c), *supra*, filed a complaint in the United States District Court for the Middle District of Georgia, seeking to enjoin certain designated state officials, the registrars and deputy registrars of voters of Terrell County, Georgia, from refusing, for reasons of race or color, to permit qualified Negro citizens of that county to register to vote; and seeking to enjoin these state officials from engaging in acts and practices which would deprive qualified Negro citizens of that county of the right, secured to them by subsection (a) of section 1971, to be permitted to vote in any election without distinction of race or color. Such acts and practices, as alleged in the complaint, included arbitrary and discriminatory delays in processing applications for registration of Negro citizens; arbitrary refusals to register Negroes who demonstrated themselves to be fully qualified to register to vote under the laws of Georgia; and discriminatory application of more difficult and more stringent registration standards to Negro applicants for registration than the standards applied to white applicants.

The District Court found that the complaint stated a cause of action under the statute, but dismissed the action on the ground that subsection (c) of section 1971, which provides for the enforcement of subsection (a), is unconstitutional.[1] The court held that subsection (c) authorizes the Attorney General to institute civil actions against private individuals as well as against persons acting under color of law, and that its enactment therefore was beyond the power conferred upon Congress by section 2 of the Fifteenth Amendment. Appendix, *infra*, pp. 33–34.

THE QUESTION IS SUBSTANTIAL

The District Court has invalidated important provisions of the civil rights legislation enacted by Congress to protect the right of citizens to vote without distinction of race or color, and to grant clear and specific judicial remedies for vindicating such right. 42 U.S.C. 1971(c) confers an obligation upon the Attorney General of the United States to seek to protect this right—a right which Congress has properly deemed fundamental to the continued existence of representative government.

The validity of 42 U.S.C. 1971 (a) and (c), as applied to action of state officials, has not previously been doubted, and the decision of the District Court holding the statute unconstitutional plainly raises substantial and important questions warranting resolution by this Court.

The holding of the District Court that Congress exceeded its constitutional power in enacting 42 U.S.C.

[1] As appears *infra*, pp. 6, 8–9, the court also in effect held subsection (a) to be unconstitutional.

1971(c) was based on the view that 42 U.S.C. 1971 (a) is a mere declaration of general principle which in terms is broad enough to embrace the protection of the right to vote without distinction of race or color against invasions by private individuals as well as by officials acting under color of law. On this construction of subsection (a), the District Court held that, since subsection (c) permits the Attorney General to bring suit against "any person" who has engaged in any act or practice which would deprive any other person of rights secured by subsection (a), these provisions exceed the authority granted to Congress by section 2 of the Fifteenth Amendment. In reaching this result, the District Court fell into plain error.

1. This suit was one against state officers, not private individuals. The complaint alleged that, at all times pertinent to the complaint, the defendants' violations of 42 U.S.C. 1971(a) were under color of law. The District Court conceded that the complaint stated a cause of action under the statute and that Congress has the power to authorize the Attorney General to bring suits against state officials acting under color of law who engage in practices proscribed by the Fifteenth Amendment. But it then went on to declare that the question was not whether the instant action was a proper one against state officials but whether the Act was broad enough to permit the institution of an improper action, in a hypothetical case, against a private citizen. "* * * [I]t is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to

catch many fish not properly within it." Appendix, *infra,* p. 22.

The question which the District Court stated "is now presented for determination by this Court" was: "Under Section 1971 as passed in 1957, is the Attorney General permitted to institute proceedings for preventive relief, where the alleged wrongful deprivation is that of a private citizen, not a state officer, not acting under color of any state law, custom or usage?" The court went on to say: "In considering this question, we must close our mind to the allegations of the complaint in the instant case." Appendix, *infra,* pp. 21–22.

This is not the correct judicial approach when the constitutionality of an Act of Congress is drawn in issue. It is a primary obligation of the courts to determine the constitutionality of a statute within the actual context of the facts involved. It is not the function of the courts to conjure up remote, hypothetical situations to which the statute conceivably might be applied—and if so applied, might be unconstitutional. As this Court said in *Liverpool, N.Y. & P.S. Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39:

> [The Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversy. In the exercise of that jurisdiction, it is bound * * * one, never to anticipate a question of constitutional law in advance of

> the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

See also *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461; *Burton* v. *United States,* 196 U.S. 283, 295; *United States* v. *U.A.W.,* 352 U.S. 567, 590–591; *Ashwander* v. *T.V.A.,* 297 U.S. 288, 346–347 (Brandeis, *J.,* concurring); *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U.S. 549, 570.

The court below disregarded this axiomatic rule of federal constitutional law by construing, and passing on the validity of, the statute as if it were being applied to a nonexistent, hypothetical set of facts. The constitutional question considered by the court was not presented to it for decision by the record of this case. Its sweeping adjudication of unconstitutionality was thus not only patently erroneous but entirely gratuitous.

2. The Act, properly construed, applies only to state officials acting under color of law, and is clearly and unquestionably constitutional. Section 1971(c) provides that "Whenever any person has engaged * * * in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) * * * the Attorney General may institute * * * a civil action * * *." The District Court correctly concluded that "any person" in subsection (c) means a person who is capable of engaging in the type of act or practice described in subsection (a). In other words, if subsection (a) is restricted, as we think it clearly must

be, to persons acting under color of law, then subsection (c) is also so limited.[2]

42 U.S.C. 1971(a), after declaring that all citizens shall be allowed to vote without distinction of race, provides that such right exists, "any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." This clause plainly indicates that subsection (a) is concerned with the action of states or persons acting under the authority of the state. The further language, that "all citizens * * * who are otherwise qualified by law" to vote shall be allowed to do so without distinction of race, likewise confirms that this subsection was intended to prohibit states and other persons acting under state authority from using race as a basis for disqualifying citizens from voting. Clearly, as the District Court itself acknowledged, the statute on its face purports to be an exercise of the power granted to Congress by the Fifteenth Amendment, Appendix, *infra,* p. 22.

The question then arises whether the District Court was justified in its conclusion that there are compelling reasons why subsection (a) should be construed to mean something other than what it says—when the effect of giving it such other construction is to destroy the statute completely. The legislative history of the Act, its context and its purpose all support the conclusion that any ambiguity

[2] With respect to actions brought to enforce rights arising under subsection (a).

that might possibly exist should be resolved in favor of such construction as would save the Act from alleged constitutional infirmities.

Subsection (a) was first enacted in 1870,[3] two months after the adoption of the Fifteenth Amendment. It clearly was meant to be an implementation of that Amendment (*e.g.*, see 1870 Cong. Globe 2808, 3571) and has been so regarded ever since.

In *Terry* v. *Adams*, 345 U.S. 461, the opinion of Mr. Justice Black stated (at page 468):

> Acting pursuant to the power granted by the second section of the Fifteenth Amendment, Congress in 1870 [enacted section 1971(a)].

And in *Reddix* v. *Lucky*, 252 F. 2d 930 (C.A. 5) the court stated (at page 933):

> Congress has implemented the Fifteenth Amendment, as it is authorized to do by its second paragraph, by the adoption of the Act of May 31, 1870, c. 114, § 1, 16 Stat. 140, formerly codified at 8 U.S.C.A., § 31; now 42 U.S.C.A., § 1971.

See also *Chapman* v. *King*, 154 F.2d 460, 461, 464 (C.A. 5), certiorari denied, 327 U.S. 800.

Moreover, section 1971(a) has frequently been invoked in cases which directly involved and turned on the question of whether the defendants were acting under color of state law [4]—a plain demonstration that

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[3] Prior to the enactment of the Civil Rights Act of 1957 it constituted all of 42 U.S.C. 1971.

[4] Among such cases are *Terry* v. *Adams*, *supra*; *Smith* v. *Allwright*, 321 U.S. 649; *Nixon* v. *Condon*, 286 U.S. 73; *Chapman* v. *King*, *supra*; *Baskin* v. *Brown*, 174 F.2d 391 (C.A. 4); *Rice* v. *Elmore*, 165 F.2d 387 (C.A. 4).

the federal courts have consistently treated that subsection as limited to state action. The decision of the court below in this case, after 42 U.S.C. 1971(a) has been on the books for 89 years, stands as the first and solitary departure from that otherwise unbroken line of judicial authority.[5]

3. When Congress, in 1957, reenacted section 1971 as subsection (a) of the new section 1971, it was of course well aware of this consistent history of judicial construction. The legislative history clearly reflects the understanding of Congress that this subsection represents an implementation of the Fifteenth and Fourteenth Amendments, and goes no further.

The House Report (H. Rep. No. 291, 85th Cong., 1st Sess.) which accompanied the bill which ultimately became the Civil Rights Act of 1957 quotes as follows from a letter from the Attorney General to the Speaker of the House of Representatives (p. 15):

> The existing civil voting statute (sec. 1971 of title 42, U.S.C.) declares that all citizens who are otherwise qualified to vote at any election (State or Federal) shall be entitled to exercise their vote without distinction of race or color. The statute is limited, however, to deprivations of voting rights by State officers or other persons purporting to act under authority of law * * *.

[5] This deviation from binding precedent cannot be defended on the ground that in the earlier cases statutes other than the present section 1971(c) were used to enforce what is now section 1971(a). For several of the decisions specifically hold that 1971(a)—not the enforcing statute—implements the Fifteenth Amendment.

Throughout the debates it was repeatedly emphasized that subsection (a) was an implementation of the Fourteenth and Fifteenth Amendments. See, for example, the comments of Representative Celler, Chairman of the House Judiciary Committee (103 Cong. Rec. 16088), and Senator Bush (103 Cong. Rec. 13138).

The fact that Congress intended that subsection (a) be limited to state action or action under color of law becomes apparent when it is considered that subsection (b) (*supra,* p. 2), by contrast, which was intended to be applicable to the actions of both state-connected and private individuals, uses the phrase "No person, whether acting under color of law or otherwise * * *." There would have been no reason for Congress to have inserted this phrase except to make clear that that subsection, unlike subsection (a), applies to private, individual action.

4. The court below placed great reliance upon *United States* v. *Reese,* 92 U.S. 214. But that case cannot be regarded as controlling authority for the approach adopted below. As Judge Learned Hand stated in *United States* v. *Dennis,* 183 F. 2d 201, 214 (C.A. 2), affirmed, *Dennis* v. *United States,* 341 U.S. 494:

> Even when there is no "separability" clause of any kind, the doctrine of *United States* v. *Reese,* 92 U.S. 214, 23 L. Ed. 563, does not always apply; the Supreme Court has often limited general words in a statute so as to make it constitutional, although in such cases a court must hazard the inference that Con-

> gress would have enacted the statute in the limited form, if it had known that in its broad scope it would be unconstitutional [footnote citing cases omitted].

This Court has held many times not only that the words of a statute must not be extended if to do so makes the statute unconstitutional, but also that a broadly worded act should be limited if necessary to preserve its constitutionality. *The Abby Dodge,* 223 U.S. 166, 175; *Crowell* v. *Benson,* 285 U.S. 22, 62; *American Power Co.* v. *S.E.C.,* 329 U.S. 90, 107–108. Construction to avoid needless breadth of scope is a prime canon of adjudication (*United States* v. *C.I.O.,* 335 U.S. 106, 120–121; *Panama RR. Co.* v. *Johnson,* 264 U.S. 375, 390; *United States* v. *Delaware and Hudson Co.,* 213 U.S. 366, 407–408) because the duty of the courts is to save and not to destroy the statute. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30. Words may even be strained, if necessary, to avoid unconstitutionality or serious doubt of constitutionality. *Blodgett* v. *Holden,* 275 U.S. 142, 148; *United States* v. *Rumely,* 345 U.S. 41, 47.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted. As applied here, the statutory provisions are plainly constitutional. In holding to the contrary, on the basis of an unjustifiable construction of the Act as it might possibly be sought to be applied to abstract, hypothetical situations not presented, the District Court fell into gross and manifest error.

Respectfully submitted.

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MAY 1959.

APPENDIX

In the District Court of the United States for the Middle District of Georgia, Americus Division

Civil Action No. 442

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES GRIGGS RAINES, DIXON OXFORD, ROSCOE RADFORD, REGISTRARS OF TERRELL COUNTY, GEORGIA, F. LAWSON COOK, SR., AND MRS. F. LAWSON COOK, SR., DEPUTY REGISTRARS, DEFENDANTS

DAVIS, *District Judge:*

This is an action instituted by the Attorney General of the United States in the name of and on behalf of the United States under the provisions of the Civil Rights Act of 1957. The complaint is one seeking preventive relief against the alleged deprivation of voting rights of certain named persons on account of their race or color. The action is brought against James Griggs Raines, Dixon Oxford, Roscoe Radford, Registrars of Terrell County, Georgia, F. Lawson Cook, Sr., and Mrs. F. Lawson Cook, Sr., Deputy Registrars of Terrell County, Georgia. It is alleged that these Defendants have engaged in wrongful acts and practices, which will deprive otherwise qualified persons of the right to vote because of their race or color. No attack is made upon any State law, but rather, it is alleged that the wrongful deprivation of voting rights will result from the improper and wrongful administration of the Georgia Registration laws by the named

Defendants. It is against this allegedly wrongful administration of the registration laws that this complaint seeks relief.

The complaint was filed on September 4, 1958. On September 23, 1958, a motion to dismiss said action was filed on behalf of all named Defendants. This motion was set down for hearing in Americus, Georgia, on January 26, 1959. Briefs were subsequently filed by counsel for all parties. Reply briefs and supplemental briefs were likewise filed. The Court has given careful consideration to the pleadings, oral arguments and extensive and exhaustive briefs filed with the Court.

The motion to dismiss is based primarily upon four main grounds. The first is the unconstitutionality of the section authorizing the Attorney General to file this action. This contention is grounded on two arguments. The Defendants argue that the sections involved are not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. Secondly, they urge that Congress had no authority to authorize the Attorney General to file a suit of this nature, since it is neither an action in law or equity. This deals in part with the authority of Congress to authorize the grant of an injunction without regard to exhaustion of other available remedies. The second main ground of the motion to dismiss is the failure of the complaint to state a cause of action under the Civil Rights Act of 1957, even if constitutional. The third ground asserts that the cause should be dismissed by the Court in the exercise of its sound discretion. Because of the Court's ultimate judgment in this matter and to facilitate clarity of presentation, these grounds will be considered in reverse order.

In the third ground of their motion, the Defendants argue that the Court should exercise its discretion and deny the relief sought, even though it be decided that the Act under which it is brought is constitutional and the complaint states a cause of action under the statute. In support of this ground, it was pointed out that no emergency existed, such as that contemplated by Congress when this Act was enacted. Though a general election was held in Georgia in November, 1958, this complaint did not seek a temporary restraining order, or any other remedy which might have enabled the allegedly wronged parties to vote in that election. It seeks instead to secure an injunction at a time when the next scheduled election is over a year in the future. The Defendants argue that the State can afford the desired remedy prior to any election and that no such emergency exists as would justify this Court's intervention.

While some of the language of the Congressional hearings does indicate that this remedy was primarily designed for emergency use, the wording of the statute imposed no such limitation. This Court cannot so limit the applicability of the statute. Similarly, the failure of the complaint to seek such relief as might have protected the voting rights of the allegedly wronged parties prior to the November election does not impede the operation of the statute. It may raise some question as to the motive of the litigation, but the Court without hearing any of the evidence would not be disposed to dismiss the proceedings in the exercise of its discretion. It is true that equitable relief may be denied in the exercise of the Court's discretion, but it should be a discretion informed by evidence. The Court is of the opinion that, based on the complaint alone, it is not in possession

of sufficient facts to dismiss the complaint in the exercise of its sound discretion.

The Court next comes to a consideration of the question of whether or not this complaint states a cause of action under the provisions of 42 U.S.C. 1971. The complaint alleges that the Defendants, as individuals, acting in the exercise of their state given authority as registrars and deputy registrars of Terrell County, Georgia, engaged in certain acts and practices, designed and intended to deny otherwise qualified persons the right to vote because of their race and color. It is alleged that they delayed handling of Negro applications for registration, arbitrarily refused to register Negroes who demonstrated their qualification to vote, and for purposes of discrimination, applied more difficult and stringent registration standards to Negro applicants than to white applicants.

It is further alleged that registration is a legal prerequisite to voting in Georgia, and that this discrimination in administration of registration procedures was on account of the race of the applicants.

There can be no question but that these allegations are sufficient to bring the allegedly wrongful conduct of the Defendants within the coverage of 42 USC 1971. Whether that statute be construed as one limited to state action, as argued by the United States, or as extending to purely individual action, as contended by the Defendants, the language of the complaint would state a cause of action. It alleges that these Defendants have engaged in certain acts or practices which will deprive others of their right to vote, when otherwise qualified, without distinction as to race or color. The acts and practices alleged are those of the Defendants while acting (even though wrongfully) in the exercise of state given authority.

Thus, under any reading of the statute, the facts alleged make out a cause of action.

So it is, that this is not a case such as Collins v. Hardyman, 341 U.S. 651, where the Court can avoid the question of constitutionality. Having determined that none of the other grounds of the Motion to Dismiss are valid, the Court now passes to the final and most important point raised by that motion; to-wit, the constitutionality of the Act under which this action is brought.

The first prong of the constitutional attack on the statute questions the authority of Congress to authorize the Attorney General to bring an action in this Court, which is neither an action in law or equity. It is urged that this is not a legal action, seeking as it does injunctive relief. On the other hand, it is argued that it is not an equitable action, since it violates one of the oldest rules of equity, the unavailability of the injunctive process where other legal remedies are available. The Defendants thus contend that this is neither a suit in law or equity, and that Congress had no right to authorize it. This Court cannot accept this contention.

While a court may question the wisdom of overruling an old and well established maxim of equity, the Court knows of no limitation on the powers of Congress to legislate in this field. The fact that Congress in sub-section (d) of Section 1971 provided that the courts shall exercise that jurisdiction "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law", does not change the nature of this action from one in equity. It merely provides that in such an equitable proceeding a certain well established principle shall not be applicable. The Court knows of no limitation on the right of Congress

to so legislate. It is well known that the Federal Courts have often refused to act because the complainants had failed to exhaust their other remedies. *Peay* v. *Cox,* 190 F. 2d, 123, 125 (5th Cir.). This rule, however, could hardly be applied where Congress has expressly directed the courts to exercise their jurisdiction without regard to such fact.

The Defendants contend that such a limitation of the court's exercise of their jurisdiction is an invasion by the legislative branch of matters properly committed to the judicial branch and thus violative of the separation of powers doctrine. The Court is far from convinced as to the soundness of this argument, but has not explored it extensively because it does not seem necessary, in view of the ultimate disposition of this motion.

This brings us, finally, to what appears to be the most substantial contention of the Defendants; that is, that 42 U.S.C. 1971 is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment and exceeds the jurisdiction of the Congress.

It should be noted at the outset that this action is one brought by the Attorney General in the name of and on behalf of the United States. It is not an action by the allegedly wronged party under the provisions of 42 U.S.C. 1983, and differs materially from those cases. In that type of case, the "self executing ban" of the Fifteenth Amendment proscribes certain conduct and Section 1983 provides a remedy therefor, without resort to 42 U.S.C. 1971. It was the availability of this "self executing ban" which has heretofore allowed the Supreme Court to apparently bypass a clear ruling on the constitutionality of Section 1971–(a). *Terry* v. *Adams,* 345 U.S. 461, 481.

In the instant case, however, the Attorney General has no standing for the bringing of this action, except the recently enacted provisions of Section 1971. Any right that he has to seek preventive relief, where citizens allegedly have been or are about to be denied their right to vote on account of race, is based on Section 1971(c). Prior to its enactment, such an action could not have been entertained. Thus, it is that the question of the constitutionality of that Section cannot be sidestepped or bypassed. Due to the wording of sub-section (c) of the statute and the way in which it is tied to sub-section (a), the latter must also be given its first really critical examination.

As originally enacted and as it remained on the statute books of this country from 1870 until 1957, the present sub-section (a) (formerly Section 1971 in its entirety), was merely a general statement of principle or of rights, without providing any sanction or remedy for its violation. *U.S.* v. *Reese,* 92 U.S. 214; *U.S.* v. *Cruikshank,* 92 U.S. 542. For this reason, no action could ever be based upon this section alone. Many actions were filed under Sections 1983 and 1971, relying also on the Fifteenth Amendment. It will be noted that in any suit filed under Section 1983, there could be no question such as is here presented, since Section 1983 is applicable only to persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." By its unmistakably clear language, Section 1983 did not authorize any action for purely private acts, even though such practice resulted in a person being deprived of the right to vote on account of his race.

This brings into focus the question which is now presented for determination by this Court. Under Section 1971 as passed in 1957, is the Attorney Gen-

eral permitted to institute proceedings for preventive relief, where the alleged wrongful deprivation is that of a private citizen, not a state officer, not acting under color of any state law, custom or usage?

In considering this question, we must close our mind to the allegations of the complaint in the instant case. The question is, not what the Attorney General has done here, but what Congress has authorized him to do. As was clearly demonstrated in the case of *United States* v. *Reese, et. al.*, 92 U.S. 214, where a statute is enacted in general terms sufficiently broad to apply to wrongful acts, outside as well as within the constitutional jurisdiction of Congress, such a statute cannot be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit. "To limit this statute in the manner now asked would be to make a new law, not to enforce an old one." *Ibid.* It is well to note that the Supreme Court was there considering one section of the Act of 1870, of which Section 1971(a) was a part.

Thus, it is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to catch many fish not properly within it.

It is clear beyond question, that the Fifteenth Amendment to the Constitution relates "solely to action by the United States or by any State, and does not contemplate wrongful individual acts." *James* v. *Bowman,* 190 U.S. 127. The statute which is here under consideration, as did the one in the above cited case, "on its face * * * purports to be an exercise of the power granted to Congress by the Fifteenth Amendment. The government of the United States is one of delegated, limited, and enumerated powers. Therefore, every valid act of Congress must find in the Constitution some warrant for its passage." *U.S.* v.

Harris, 106 U.S. 629. The power of Congress to legislate at all upon the subject of voting at State elections rests upon the Fifteenth Amendment. Prior to its enactment there was no constitutional guaranty against discrimination on account of race, color or previous condition of servitude. *U.S.* v. *Reese, et al.,* 92 U.S. 214.

Thus, it will be seen that, if Section 1971(c) is constitutional, it is because of the power given Congress by the Fifteenth Amendment. As stated, that Amendment relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. The Court is mindful, of course, of the cases holding that a state acts through its lawfully constituted officials and that action by one exercising his state given authority (even though wrongly exercising it) constitutes state action. Thus, for present purposes, it will be assumed that the Fifteenth Amendment authorizes Congress, by appropriate legislation, to prohibit and punish deprivation of voting privileges on account of race or color by any State or by the officers of any State while in the exercise of state given authority. It does not, however, authorize Congress to prohibit or punish purely individual and private action depriving another of his rights to vote on account of his race or color.

This brings us to the meat of the controversy here: What does Section 1971(c) seek to do? Is it limited to state action, as previously defined, or is it sufficently broad to encompass wrongful action by individuals?

In determining the scope of Section 1971(c), the Court must first consider the language of that section. Is there any limitation within the section itself? The section, as enacted in 1957, reads, as follows:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person. 42 U.S.C. 1971(c)

It will be noted at the outset that the section itself includes no limitation as to the persons subject to suit under it. It includes *any person* engaging in or about to engage in a certain type of conduct. By its own terms the section is applicable to any person engaging in the type of action described herein. Thus, it follows that the only limitation, if any there be, must come from the act or practice described therein. In other words, any person capable of engaging in the type of act or practice described would be subject to suit by the Attorney General. If any person other than one clothed with state authority can engage in such act or practice, then the section is broad enough to allow suit against him and is not limited to state action. It will be particularly noted that the section makes no references to color of law, a phrase with which the Congress is very familiar, having used it in other sections of this, as well as other Civil Rights Acts. More will be said about this later.

Now, what is the proscribed act or practice which brings this section into play? It is not any act or practice which would deprive another of his rights under the Fifteenth Amendment. If that were the language, there could be no doubt about its limita-

tion to state action, since a private citizen acting individually cannot deprive another of his rights under the Fifteenth Amendment. As argued in *James* v. *Bowman,* 190 U.S. 127, 135, a statute in such general language aimed only at such acts as deprived another of whatever rights he had under the Fifteenth Amendment, could not be unconstitutional. It would just be up to the Courts then to determine in each case whether or not the statute applied to the conduct alleged in the complaint. The statute itself would proscribe only that which violated the Amendment. Any set of facts falling short of a violation of the Amendment would not state a cause of action under the statute.

Here, however, Congress did not so limit the statute. The action proscribed therein is "any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section." Again we come to the question: Can any person other than one clothed with the authority of the State engage in such an act or practice? To properly determine that, we must first determine what rights and privileges are secured by subsection (a) of Section 1971. (All parties concede that subsection (b) is not here involved.)

Subsection (a) of 42 U.S.C. 1971 was originally passed in 1870, as a part of what was known as the Enforcement Act, consisting of 23 sections. It was enacted soon after the adoption of the 14th and 15th Amendments. It was in some respects a sort of preamble to the Enforcement Act, in that it merely stated a right or privilege, while the sections that followed it sought to establish remedies for specific violations of civil rights. The section, as originally enacted, was reenacted in 1957 as subsection (a) of Section 1971. Theretofore it had been the entire section.

The subsection reads as follows:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. 42 U.S.C. 1971(a).

Now, what is the right or privilege secured by this subsection? In this Court's opinion, it is the right and privilege of all persons otherwise qualified to vote to be entitled and allowed to vote, without distinction of race or color and to effectuate this right all state constitutional provisions, laws, customs, usages and regulations to the contrary are expressly set aside.

But, this right to be entitled and allowed to vote, as stated, is not simply the right to be free of state interference but is the right to be free of interference from any source on account of one's race or color. It may be that the word "entitled", as used, carries with it some idea of state action only, since entitlement to vote can come from the state alone and can be denied only by the state, acting through its officials. Entitlement is a legal status, which can neither be conferred nor denied by a private citizen. But, the phrase "allowed to vote" carries with it no such idea of state action or legal status. It denotes the physical action of voting and it may be interfered with or denied to another by any person, state official or private citizen. A person who is kidnapped at the polls and spirited away has been denied his right to be allowed to vote. One who is

prevented from voting through threats or intimidation has been denied his right to be allowed to vote, just as completely as if the poll manager had refused to accept his ballot. It thus appears to this Court that the right secured by this subsection is such a right of which a person can be deprived, by the act or practice of any other person, state official or private citizen.

This view is strengthened by a look at the other provisions of the Enforcement Act of 1870, of which this subsection, verbatim, was the first section. As previously stated, it was a sort of preamble to that Act, in that it stated general principles while the following sections contained the "teeth".

The Court feels that it is, therefore, proper to consider the fact that in Section Five of the Enforcement Act of 1870, Congress made it a crime for any individual to hinder, control or intimidate others by bribery or threats from exercising their right of suffrage guaranteed by the Fifteenth Amendment. While this section was declared unconstitutional in the case of *James* v. *Bowman,* 190 U.S. 127, on the same grounds here urged, and is no longer on the books, it does have some bearing, in that it reflects the thinking of the Congress which originally enacted this legislation. In this Court's opinion, the imposition of a criminal sanction, for purely private and individual action, indicates that the previous general statement of principle and rights was sufficiently broad to include the right to be free from private as well as state interference.

It is of interest to note that Sections Three, Four and Five of the Act of 1870 have since been declared unconstitutional as in excess of the jurisdiction conferred upon Congress by the Fifteenth Amendment. This, to say the least, waters down considerably any

presumption that Congress on this occasion was acting within the scope of its legislative authority. Any such presumption is further weakened by the principle that the Government of the United States, being a government of limited and enumerated powers, every valid act of Congress must find in the Constitution some warrant for its passage. *U.S.* v. *Harris*, 106 U.S. 629, 636.

In carefully scrutinizing this passage, in order to determine whether the right therein declared is limited to the right to be free from state discrimination, the Court is impressed with the reasoning of the dissenting opinion of Justices Burton, Black and Douglas, in the case of *Collins* v. *Hardyman*, 341 U.S. 651, 663, 664, wherein it was stated: "The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. R.S. Sec. 1980(3) speaks of 'two or more persons in any State or Territory' conspiring. That clause is not limited to state officials. Still more obviously, where the section speaks of persons going 'in disguise on the highway * * * for the purpose of depriving * * * any person or class of persons of the equal protection of the laws', it certainly does not limit its reference to actions of that kind by state officials. When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms."

It is the opinion of this Court that this statement applies with equal force to subsections (a) and (c). In 1870, when (a) was first enacted, and in 1957 when (c) was enacted, Congress in other and similar legislation demonstrated its ability to limit such legislation to state officials by the use of clear and unequivocal language. The term "under color of law" was em-

ployed in subsection (b) of the Act of 1957. Other sections of the Act of 1870 employed the phrase "whenever, by or under the authority of the constitution or laws of any State * * *".

It is interesting to note, in this connection, that the complaint of the United States in this case defines the rights and privileges secured by subsection (a) of the statute in Paragraph One, in the following language: "the right and privilege of citizens of the United States who are otherwise qualified by law to vote at any election by the people in the State of Georgia to be entitled and allowed to vote at all such elections without distinction of race or color."

This statement of the right secured completely omits any reference to state constitutions, laws, usage, custom or regulations. The right is similarly defined in the majority report of the House Committee which recommended passage of the Act. House Report No. 291, U.S. Code Congr. and Admin. News, 85th Cong., 1st Sess., 1957, p. 197.

The language of the subsection following the semicolon; to-wit: "any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding", was not intended to qualify and limit all that had gone before it in the section. To so hold would mean that even direct and positive state action of discrimination in voting rights on account of color could not be reached under this statute, unless the state action was based on some constitutional provision, law, custom, usage or regulation. Clearly, this was not intended when the section was reenacted by Congress in 1957. This point is supported by the testimony of Attorney General Brownell during the House Hearings on the Civil Rights Act of 1957, wherein he stated:

"For example, if you have a registrar of voters

who arbitrarily strikes off several thousand names of Negro voters shortly before the deadline for qualification of voters and gives no hearing to them or an inadequate hearing, then I would think that would be a case that would alert the Attorney General under this bill to the need for some injunctive action, which would give those people their day in court and allow them, like any other citizen, the right of franchise." Hearings of Subcommittee of House on the Civil Rights Act of 1957, Serial No. 1, p. 601.

Clearly, it could not be argued that such conduct by one registrar in contravention of state law was based on any constitutional provision, statute, usage, custom or regulation. An isolated example could hardly be termed a state custom or usage. Congress did not intend to so limit the application of this section. If it was not an absolute limitation as written, it could hardly be re-worded by the courts to limit the section to a deprivation of voting rights by state officials only.

It may be argued, and has been, that the reliance on this section over the years proves its constitutionality. In viewing this contention, it must be remembered that this section was in no wise remedial. It was relied upon only in cases brought under remedial statutes, which included the term "under color of statute, ordinance, regulation, custom, or usage, of any State or Territory", and other similar language. When the two sections were construed together, they clearly did not provide any remedy against private individual action. Thus, there was no reason for any attack on subsection (a). Now, however, Congress seeks to tie together two sections, neither of which is limited to state action or action by state authority. This it cannot do. When linked with a remedial statute properly limited, subsection

(a) is harmless. But, when linked, as here, with a remedial section which uses the phrase "any person", it renders the remedial section beyond the jurisdiction of Congress and unconstitutional.

Subsection (c) creates a remedy against purely private, as distinguished from state, deprivation of voting rights on account of race or color. The fact that the instant case is a suit against state officials cannot alter the scope of the statute. This illustrates the danger of this type of legislation, which danger was recognized as early as the case of *United States* v. *Reese, et al.*, 92 U.S. 214. There the Court held: "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, can be limited by judicial construction, so as make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there." It is true that there the Court was dealing with a penal statute. Here we are dealing with a statute authorizing an injuction, violation of which may carry its own penalty. The same principle would seem applicable.[1] When a person is enjoined from

[1] During the Subcommittee hearings on the Civil Rights Act of 1957, Senator Ervin made the following remark: "* * * if Congress has no power to provide any criminal penalties for those acts under the Constitution because it has no

violating a statute, he is entitled to know what that statute proscribes, without awaiting the finality of an authoritative court opinion.

As stated in the Reese case, supra: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

That this is exactly what this section seeks to do is demonstrated by the testimony of Attorney General Brownell in the Senate Hearings before the Subcommittee on Constitutional Rights while considering the Civil Rights Act of 1957. On Page 25 of those Hearings, Mr. Brownell testified: "These sections 4 and 5" (subsections (c) and (d) of the law as enacted) "are added here as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area, and does not add to the substantive provisions of the statute."

Again, at page 51, he testified: "* * * our guiding principle will be that only those statutes, parts of statutes that are constitutional, would be enforced by us, and we would not act in any way contrary to a Supreme Court opinion which holds that a statute or any part thereof that is unconstitutional." This indicates that the statute as written is sufficiently broad to include unconstitutional matter, but that the Attorney General expressed his intention of administering it in such a way as to seek no unconstitutional relief.

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right to legislate in that particular area, it certainly would have no right to enact a civil law."

To which Mr. Brownell replied: "That is correct, and we are not asking for it." The difference between the type of remedy provided would not seem to alter the right of Congress to legislate with reference to it. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, February 14, 1957, p. 25.

While this is a noteworthy sentiment, the tenure of the Attorney General being what it is, the Courts can hardly rely on his intentions as to the administration of an act which in itself would support the grant of unconstitutional relief, if requested.

The Court has explored this question with particularity, because it is not unmindful in the least of the seriousness of the problem. This Court has never and shall never condone wrongful deprivation of the constitutional rights of any person by a state official or a private citizen. On the other hand, this Court is also sensitive to the dual sovereignty system of government under which we operate and is sincerely devoted to its preservation.

It is this Court's considered opinion that this statute would allow the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action. It is the province of the several states to protect the rights of one citizen against the wrongful practices of another person. *James* v. *Bowman,* 190 U.S. 127. Congress should not be allowed to extend the authority of the Federal Government into this field. This it has tried to do. The Court is of the opinion that, if Congress intended only to authorize the Attorney General to enjoin or seek preventive relief against wrongful state action, it could easily have been accomplished, without resort to such confused legislation. Similar, if Congress wishes to leave the courts some latitude in determining what may and what may not be enjoined, this may be accomplished by tying the remedy directly to the Fifteenth Amendment, rather than to another section, the constitutionality of which is far from clear.

For the reasons set forth above, the Court concludes that Section 1971(c) of Title 42 is beyond the

jurisdiction of Congress and unconstitutional. It is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. There existing no other basis for an action by the Attorney General in the name of the United States seeking the remedy here sought, the motion to dismiss should be, and the same is hereby, GRANTED.

ORDERED FILED, this the 16th day of April, 1959.

T. HOYT DAVIS,
United States District Judge.

In the District Court of the United States for the Middle District of Georgia, Americus Division

Civil Action No. 442

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES GRIGGS RAINES, DIXON OXFORD, ROSCOE RADFORD, REGISTRARS OF TERRELL COUNTY, GEORGIA, F. LAWSON COOK, SR., AND MRS. F. LAWSON COOK, SR., DEPUTY REGISTRARS, DEFENDANTS

Order Dismissing Complaint

In accordance with the opinion filed in the above stated case on this date, it is hereby ORDERED and ADJUDGED that the complaint in said cause be and the same is hereby, DISMISSED. Costs are taxed against the United States.

This the 16th day of April, 1959.

T. HOYT DAVIS,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1959